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Washington, D.C. 20463

**SENSITIVE**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6402  
DATE OF COMPLAINT: October 20, 2010  
DATE OF NOTIFICATION: October 27, 2010  
DATE OF LAST RESPONSE: October 12, 2011  
DATE ACTIVATED: February 7, 2011

SOL: January 1, 2015

**COMPLAINANT:**

Public Citizen  
ProtectOurElections.org  
ProsperityAgenda.us  
Center for Media and Democracy

**RESPONDENTS:**

American Future Fund

**RELEVANT STATUTES:**

2 U.S.C. § 432  
2 U.S.C. § 433  
2 U.S.C. § 434

**INTERNAL REPORTS CHECKED:**

Disclosure

**FEDERAL AGENCIES CHECKED:**

None

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**I. INTRODUCTION**

In 2010, American Future Fund ("AFF") spent millions of dollars on federal campaign activity. This matter involves allegations that AFF violated the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA") by failing to organize, register, and report as a political committee in 2010. *See* Compl. at 1-2.

AFF acknowledges making and reporting approximately \$7.36 million in independent expenditures during 2010. Resp. at 2. As a consequence, AFF concedes that it exceeded the Act's \$1,000 threshold for expenditures or contributions triggering political committee status. 2 U.S.C. § 431(4). AFF argues, however, that it is not a political committee under the Act because it lacks the requisite major purpose: the nomination or election of federal candidates. Resp. at 1. AFF's argument rests on the assertion that, in 2010, it spent greater sums on activity not considered express advocacy than it did on independent expenditures. *Id.* at 3. In our view, the argument is wide of the mark.

As discussed below, the available information regarding AFF's overall conduct in 2010 supports a finding that there is reason to believe that AFF had as its major purpose the nomination or election of federal candidates. Accordingly, we recommend that the Commission find reason to believe that AFF violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize, register, and report as a political committee, and authorize an investigation.

1     **II.     FACTUAL AND LEGAL ANALYSIS**

2             **A.     Facts**

3                     1.     **AFF**

4             AFF is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue  
5     Code. It was formed in August 2007 and began issuing public communications in March 2008.<sup>1</sup>  
6     AFF's current president, secretary, and treasurer, respectively, are a sitting Republican member  
7     of the Iowa state legislature (Sandy Greiner), a former Finance Director of the Republican Party  
8     of Iowa (Darrell Kearney), and a "life-long conservative grassroots activist" (Barbara Smeltzer).  
9     See <http://americanfuturefund.com/about-us>. Iowa's Republican governor, Terry Branstad,  
10    served as chairman of AFF's Lecture Series. See Jason Hancock, *American Future Fund Among*  
11    *Top Campaign Spenders in 2010*, IOWA INDEP. (Jan. 7, 2011).

12            AFF's Articles of Incorporation state that the group "is established primarily to further  
13    the common good and general welfare of the citizens of the United States of America by  
14    educating the citizens of the United States about public policy issues." Resp. at 12. AFF  
15    describes itself as a "multi-state issues advocacy group designed to effectively communicate  
16    conservative and free market ideals." *Id.*; <http://americanfuturefund.com/about-us>.

17            AFF also has a related political committee that is registered with the Commission —  
18    American Future Fund Political Action ("AFFPA"). AFFPA is located in Virginia, and its  
19    treasurer is Chris Marston. AFFPA, Statement of Organization (Oct. 23, 2012),  
20    <http://images.nictusa.com/pdf/275/12940383275/12940383275.pdf>. AFFPA received \$33,337

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<sup>1</sup> In MUR 5988, the Commission found no reason to believe that AFF violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. The Commission found that the totality of AFF's activities through September 2008 did not indicate that federal campaign activity was its major purpose. See Amended Certification, MUR 5988 (American Future Fund) (Feb. 29, 2009); Factual and Legal Analysis at 7, MUR 5988. The activities at the heart of this matter occurred well after MUR 5988 was closed.

1 and spent \$35,495 in 2010. AFFPA, 2010 Year End Report at 2 (Jan. 30, 2011),  
2 <http://images.nictusa.com/pdf/731/11930251731/11930251731.pdf>.

3 2. AFF's 2010 Activities

4 AFF states that it spent approximately \$21 million between January 1, 2010, and  
5 November 30, 2010. Resp. at 2. Of its total disbursements during this period, approximately  
6 \$7.36 million was for reported independent expenditures. *Id.* AFF also reported spending  
7 approximately \$1.74 million on electioneering communications in 2010.<sup>2</sup> AFF spent an  
8 unknown amount on the following activities in 2010:

- 9 • Producing and circulating Congressional scorecards<sup>3</sup> and engaging in door-to-  
10 door GOTV activity.
- 11 • Holding a lecture series.
- 12 • Serving as an "ethics-watchdog, [and] monitoring members of Congress and their  
13 campaigns for illegal behavior."
- 14 •
- 15
- 16

<sup>2</sup> AFF's response states that it spent "nearly \$2.5 million" on electioneering communications in 2010. *Id.* at 9. Reports filed with the Commission, however, place the total at approximately \$1.74 million. The discrepancy (approximately \$678,000) appears to be the result of AFF counting amended reports as new reports, and thus double-counting certain disbursements.

<sup>3</sup> This "AFF Score Card" formerly contained a disclaimer stating that it was "Paid for by the American Future Fund Political Action." The disclaimer has since been changed to read: "Paid for by the American Future Fund." See <http://americanfuturefund.com/south-carolina-aff-score-card>.

- Operating a blog and website "discussing conservative issues,"<sup>4</sup> a website asking Tom Campbell to sign a "taxpayer protection pledge,"<sup>5</sup> and Twitter feed, through which it distributes news articles and commentary to its followers.<sup>6</sup>
- Issuing one press release entitled "AFF Launches TV Ads in Four States Targeting Liberal Politicians"<sup>7</sup> and another release describing its "Teleprompter" print ad;
- Running five print advertisements: "Start Over and Get health Care Right"; "Keep Walking the Plank"; "Teleprompter"; "The Losers of 1994... Thanks to Health Care"; and "Keep it Up, Liberals."

See Resp. at 8-10, Attachs. AFF reportedly also spent an unknown amount on mailers, websites, and Twitter messages discussing various candidates.<sup>8</sup> AFF's response does not indicate how much it spent on overhead or administrative expenses.

In its Supplemental Response, AFF provided a list of additional activities in which it engaged during 2011, including making independent expenditures; giving to various 501(c)(3) and 501(c)(4) organizations; continuing its lecture series; presenting at the CPAC and Faith and Family Coalition conferences; producing six television, radio, and Internet advertisements; and maintaining AFF's blog. Supplemental Resp. at 2-3.

<sup>4</sup> During the initial stages of this MUR, each page of the website and blog contained a disclaimer at the bottom stating: "Paid for by the American Future Fund Political Action. <http://political.americanfuturefund.com>. Not authorized by any candidate or candidate's committee." The disclaimer has since been changed to read: "Paid for by the American Future Fund. <http://www.americanfuturefund.com>. Not authorized by any candidate or candidate's committee."

<sup>5</sup> This "AFF website" contains a disclaimer that it was "Paid for by the American Future Fund Political Action." See Response, Attachs.

<sup>6</sup> AFF's Twitter handle (@AmFutureFund) is apparently shared with American Future Fund Political Action. See <http://political.americanfuturefund.com/> (where clicking on "Connect with us on Twitter" directs to the Twitter page for @AmFutureFund).

<sup>7</sup> This press release appears to have been printed from AFF's blog, and it contains a disclaimer that it was "Paid for by the American Future Fund Political Action." See Response, Attachs.

<sup>8</sup> See Craig Robinson, *American Future Fund Reserves Over \$800k in Iowa's 1st District*, IOWA REPUBLICAN (Sept. 28, 2010); Jason Hancock, *Iowa Group Continues Attacks Against Rand Paul*, IOWA INDEP. (May 10, 2010); Matt Viser, *Conservative Group Used Tweet Strategy Against Coakley*, BOSTON GLOBE (May 4, 2010). AFF neither confirms nor denies that it disseminated the messages discussed in the *Boston Globe* article. See Supplemental Resp. at 4.

**B. Analysis**

**1. The Test for Political Committee Status**

The Act and Commission regulations define a “political committee” as “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that defining political committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching “groups engaged purely in issue discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that the term “political committee” “need only encompass organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate.*” *Id.* (emphasis added). Accordingly, under the statute as thus construed, an organization that is not controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election of federal candidates.

**a. The Commission’s Case-By-Case Approach to Major Purpose**

Although *Buckley* established the major purpose test, it provided no guidance as to the proper approach to determine an organization’s major purpose. *See, e.g., Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”). The Supreme Court’s discussion of major purpose in a subsequent opinion, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) (“*MCFL*”), was similarly sparse. *See id.* at 262. In that case, the Court identified an organization’s independent spending as a relevant factor in determining an organization’s major purpose, but examined the entire record as part of its analysis and did not chart the outer bounds of the test.

1 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts have refined the major purpose test  
2 — but only to a limited extent.<sup>9</sup> In large measure, the contours of political committee status —  
3 and the major purpose test — have been left to the Commission.<sup>10</sup>

4 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case  
5 basis whether an organization is a political committee, including whether its major purpose is the  
6 nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5,596  
7 (Feb. 7, 2007) (Supplemental Explanation and Justification). The Commission has periodically  
8 considered proposed rulemakings that would have determined major purpose by reference to a  
9 bright-line rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an  
10 organization on federal campaign activity. But the Commission consistently has declined to  
11 adopt such bright-line rules. *See* Independent Expenditures; Corporate and Labor Organization  
12 Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking);  
13 Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance  
14 Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the  
15 Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,”  
16 Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

<sup>9</sup> *See* *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also* *Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

<sup>10</sup> Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”)

1 In 2004, for example, the Commission issued a notice of proposed rulemaking asking  
2 whether the agency should adopt a regulatory definition of “political committee.” *See* Political  
3 Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed  
4 Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been  
5 applying the major purpose test “for many years without additional regulatory definitions,” and  
6 concluded that “it will continue to do so in the future.” *See* Final Rules on Political Committee  
7 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and  
8 Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

9 b. Challenges to the Commission’s Major Purpose Test and the  
10 Supplemental E&J  
11

12 When the Commission’s 2004 decision not to adopt a regulatory definition was  
13 challenged in litigation, the court rejected plaintiffs’ request that the Commission initiate a new  
14 rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (“*Shays I*”). The district  
15 court found, however, that the Commission had “failed to present a reasoned explanation for its  
16 decision” to engage in case-by-case decision-making, rather than rulemaking, and remanded the  
17 case to the Commission to explain its decision. *Id.* at 116-17.

18 Responding to the remand, the Commission issued a Supplemental Explanation and  
19 Justification for its final rules on political committee status to further explain its case-by-case  
20 approach and provide the public with additional guidance as to its process for determining  
21 political committee status. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007)  
22 (“Supplemental E&J”). The Supplemental E&J explained that “the major purpose doctrine  
23 requires fact-intensive analysis of a group’s campaign activities compared to its activities  
24 unrelated to campaigns.” *Id.* at 5601-02. The Commission concluded that the determination of  
25 an organization’s major purpose “requires the flexibility of a case-by-case analysis of an

1 organization's conduct that is incompatible with a one-size fits-all rule," and that "any list of  
2 factors developed by the Commission would not likely be exhaustive in any event, as evidenced  
3 by the multitude of fact patterns at issue in the Commission's enforcement actions considering  
4 the political committee status of various entities." *Id.*

5 To determine an entity's "major purpose," the Commission explained that it considers a  
6 group's "overall conduct," including public statements about its mission, organizational  
7 documents, government filings (e.g., IRS notices), the proportion of spending related to "federal  
8 campaign activity," and the extent to which fundraising solicitations indicate funds raised will be  
9 used to support or oppose specific candidates. *Id.* at 5597, 5605. Among other things, the  
10 Commission informed the public that it compares how much of an organization's spending is for  
11 "federal campaign activity" relative to "activities that [a]re not campaign related." *Id.* at 5601,  
12 5605 (emphasis added).

13 To provide the public with additional guidance, the Supplemental E&J referenced  
14 enforcement actions on the public record, as well as advisory opinions and filings in civil  
15 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission noted that  
16 the settlements in several MURs involving section 527 organizations "provide considerable  
17 guidance to all organizations" regarding the application of the major purpose test and "reduce  
18 any claim of uncertainty because concrete factual examples of the Committee's political  
19 committee analysis are now part of the public record." *Id.* at 5595, 5604.

20 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again  
21 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's  
22 case-by-case approach to political committee status. The court rejected the challenge, upholding  
23 the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.

1 *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) (“*Shays II*”). The court recognized that “an  
2 organization . . . may engage in many non-electoral activities so that determining its major  
3 purpose requires a very close examination of various activities and statements.” *Id.* at 31.

4 Recently, the Fourth Circuit rejected a constitutional challenge to the Commission’s case-  
5 by-case determination of major purpose. The court upheld the Commission’s approach, finding  
6 that *Buckley* “did not mandate a particular methodology for determining an organization’s major  
7 purpose,” and so the Commission was free to make that determination “either through  
8 categorical rules or through individualized adjudications.” *RTAA*, 681 F.3d at 556. The court  
9 concluded that the Commission’s case-by-case approach was “sensible, . . . consistent with  
10 Supreme Court precedent and does not unlawfully deter protected speech.” *Id.* at 558.<sup>11</sup> The  
11 Fourth Circuit concluded that the Supplemental E&J provides “ample guidance as to the criteria  
12 the Commission might consider” in determining an organization’s political committee status and  
13 therefore is not unconstitutionally vague. *Id.*; see Transcript of Telephonic Oral Ruling, *Free*  
14 *Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (citing *RTAA* and finding

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<sup>11</sup> The *RTAA* court rejected an argument — similar to the one made by AFF here — that the major purpose test must be confined to “(1) examining an organization’s expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing ‘the organization’s central purpose revealed by its organic documents.’” *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization’s major purpose “is inherently a comparative task, and in most instances it will require weighing some of the group’s activities against others.” *Id.* at 556; see also *Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission’s approach to determining political committee status, and noting that “an organization’s ‘major purpose’ is inherently comparative and necessarily requires an understanding of an organization’s overall activities, as opposed to its stated purpose”); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its major purpose the election of federal candidates).

Commission's method of determining political committee status to be constitutional), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012).<sup>12</sup>

c. Organizational and Reporting Requirements for Political Committees

Political committees — commonly known as “PACs” — must comply with certain organizational and reporting requirements set forth in the Act. PACs must register with the Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains its records, and identify themselves through “disclaimers” on all of their political advertising, on their websites, and in mass e-mails. *See* 2 U.S.C. §§ 432-34; 11 C.F.R. §110.11(a)(1).<sup>13</sup> The Act's reporting requirements “are minimal” and the organizational requirements are not “much of an additional burden.” *SpeechNow.org v. FEC*, F.3d 686, 696 (D.C. Cir. 2010) (“*SpeechNow*”). These requirements, which promote disclosure, do not, of course, prohibit speech. *RTAA*, 681 F.3d at 552 n.3.

In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which struck down the Act's prohibitions on corporate independent expenditures and electioneering communications, the D.C. Circuit held in *SpeechNow* that political committees that engage only in independent expenditures are not subject to contribution limits. *See* 599 F.3d at 696. These political committees, often referred to as independent expenditure-only political

<sup>12</sup> The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. *See* 132 S. Ct. 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission's approach to major purpose and has withstood both APA and constitutional challenges. *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

<sup>13</sup> An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

1 committees or Super PACs, continue to be subject, however, to the “minimal” “reporting  
2 requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of  
3 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at 689.

4 Notably, the Supreme Court has stressed that such requirements serve the vital role of  
5 disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916 (recognizing that  
6 increased “transparency” resulting from FECA disclosure requirements “enables the electorate to  
7 make informed decisions and give proper weight to different speakers and messages”); *Doe v.*  
8 *Reed*, 561 U.S. \_\_\_, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state  
9 referendum petitions serves important government interest of “promot[ing] transparency and  
10 accountability in the electoral process,” and “preserving the integrity of the electoral process”);  
11 *Madigan*, 697 F.3d at \_\_\_ (upholding Illinois’s campaign finance disclosure provisions against  
12 constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its  
13 electorate about who is speaking before an election”); *see also Doe*, 130 S. Ct. at 2837 (Scalia,  
14 J., concurring) (“Requiring people to stand up in public for their political acts fosters civic  
15 courage, without which democracy is doomed.”).<sup>14</sup>

16 2. Application of the Test for Political Committee Status to AFF

17 a. Statutory Threshold

18 To assess whether an organization has made an “expenditure,” the Commission “analyzes  
19 whether expenditures for any of an organization’s communications made independently of a  
20 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader  
21 definition at 11 C.F.R. § 100.22(b).” Supplemental E&J at 5606. According to the response,  
22

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<sup>14</sup> *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied to associations that do *not* meet Buckley’s “major purpose test” are unduly burdensome and do not match any “sufficiently important disclosure interest”).

1 AFF spent approximately \$7.36 million on reported independent expenditures in 2010. Resp. at

2 2. Thus, AFF far exceeded the \$1,000 statutory threshold for political committee status.

3 b. Major Purpose

4  
5 AFF's statements of purpose provided in its response and on its website assert that the  
6 group's major purpose is not federal campaign activity but rather issue advocacy and education.  
7 See *supra* at 4. The Commission noted in the Supplemental E&J that it may consider such  
8 statements in its analysis of an organization's major purpose, Supplemental E&J at 5606, but that  
9 such statements are not necessarily dispositive. See *Real Truth About Obama v. FEC*, No. 3:08-  
10 cv-00483, 2008 WL 4416282, at \*14 (E.D. Va. Sept. 24, 2008) ("A declaration by the  
11 organization that they are *not* [organized] for an electioneering purpose is not dispositive.")  
12 (emphasis in original, alteration added), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other*  
13 *grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom.*  
14 *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127  
15 (U.S. Jan. 7, 2013) (No. 12-311). Under the Commission's case-by-case approach, the  
16 Commission considers the organization's "overall conduct," including its disbursements,  
17 activities, and statements. Supplemental E&J at 5597.

18 According to AFF, it spent approximately \$21 million in 2010 — \$7.36 million on  
19 reported independent expenditures and approximately \$1.74 million<sup>15</sup> on reported electioneering  
20 communications. The details of AFF's remaining spending, however, were not revealed by AFF  
21 and remain unknown.<sup>16</sup> According to AFF, the remainder of its spending was on a variety of

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<sup>15</sup> See *supra* n.2.

<sup>16</sup> Because AFF is a 501(c)(4) organization, its tax documents (such as its Form 1024 and Forms 990) do not reveal overall spending and the amount spent on its various other activities such as grassroots lobbying, issue advocacy, and education.

1 issue advocacy communications and educational activities, some of which are attached to the  
2 response. *See Resp. at 10.*<sup>17</sup>

3 In past enforcement actions, the Commission has determined that funds spent on  
4 communications that support or oppose a clearly identified federal candidate, but do not contain  
5 express advocacy, should be considered in determining whether that group has federal campaign  
6 activity as its major purpose.<sup>18</sup>

7 For example, the Commission has relied, in part, on the following advertisements in  
8 determining that an entity was a political committee:

- 9 • **Child's Pay:** The advertisement contains "images of children performing labor-  
10 intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel hallway,  
11 working on an assembly line in a factory, collecting garbage, working at an auto  
12 repair shop, and checking groceries," and concludes with the question: "Guess  
13 who's going to pay off President Bush's \$1 trillion deficit?"<sup>19</sup>  
14
- 15 • **70 Billion More:** The advertisement shows images of a young boy sitting at a  
16 school desk and a young girl with a thermometer in her mouth. The voice-over  
17 states: "We could build thousands of new schools, or hire a million new teachers.  
18 We could make sure every child has insurance. Instead, George Bush has spent  
19 \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after

<sup>17</sup> Several of these activities, however, contain disclaimers stating that they were "Paid for by the American Future Fund Political Action." *See supra* n.3-7. Thus, the total amount of AFF's spending in 2010 should be reduced by the amount that AFF Political Action spent on these activities. That figure is not available.

<sup>18</sup> *See* Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60 percent of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); *see also* Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because "the vast majority of [the group's disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate").

<sup>19</sup> Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."<sup>20</sup>

- **Jobs:** "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."<sup>21</sup>
- **Yucca You Decide:** "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"<sup>22</sup>
- **Finish It:** [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq. Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it."<sup>23</sup>
- **Ashley's Story:** This advertisement recounts the story of Ashley Faulkner, whose mother was killed in the September 11, 2001, terrorist attacks, and the interaction she had with President George W. Bush during a visit to Ohio. It closes with Ashley Faulkner's father stating: "What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country."<sup>24</sup>

The Commission found that each of these advertisements — though not express advocacy — indicated that the respondents had as their major purpose the nomination or election of federal

<sup>20</sup> *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

<sup>21</sup> Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at [http://archive.org/details/lcv\\_jobs\\_102604](http://archive.org/details/lcv_jobs_102604).

<sup>22</sup> *Id.* at 5, 18. The full communication can be viewed at [http://archive.org/details/lcv\\_yucca\\_decide](http://archive.org/details/lcv_yucca_decide).

<sup>23</sup> Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

<sup>24</sup> *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story>.

1 candidates. These ads evidenced that the organization's major purpose was federal campaign  
2 activity because they "support," "oppose," "praise," or "criticize" the federal candidates. *See*  
3 *supra* n.18-24.

4 Likewise, the following advertisements on which AFF spent an unknown amount in  
5 2010, though not express advocacy, support or oppose federal candidates and therefore provide  
6 evidence that AFF had as its major purpose the nomination or election of federal candidates.

7 i. "Mosque"

8 For centuries, Muslims built mosques where they won military victories.  
9 Now they want to build a mosque at Ground Zero, where Islamic terrorists  
10 killed 3,000 Americans. It's like the Japanese building at Pearl Harbor.  
11 The Muslim cleric building the mosque believes America was partly  
12 responsible for 9/11 and is raising millions overseas from secret donors.  
13 But incredibly, Bruce Braley supports building a mosque at Ground Zero.  
14 Tell Braley what you think.<sup>25</sup>

15  
16 ii. "Out of Control"

17  
18 Billions for Wall Street. Trillions for big government health care.  
19 Washington is out of control. Tom Campbell? More of the same.  
20 Campbell has a more than 20-year record of higher taxes and spending.  
21 He supported a higher sales tax, gas tax, and a carbon tax, and backed the  
22 largest tax increase in state history last year. And as budget director,  
23 Campbell drove us deeper into debt with the largest spending increase in  
24 state history. Tell Tom Campbell: sign our "No New Taxes" pledge.<sup>26</sup>

25  
26 iii. "Positive Issues"

27  
28 [Announcer:] Kelly Ayotte. [Footage of Kelly Ayotte speaking:] "It  
29 seems right now in Washington, they think for every problem, you need a  
30 big government solution. They're spending the money that we don't have  
31 – trillions of dollars – leaving our children with a debt that they can't  
32 repay. I think it's important for us to go back to core Republican

<sup>25</sup> The communication may be viewed at <http://youtu.be/ouDgM9NfNVA>.

<sup>26</sup> The communication may be viewed at <http://youtu.be/HXls8u5F7uE>.

1 principles. Let's take our country back and fight hard." [Announcer:]  
2 Call Ayotte. Tell her to keep fighting the big spenders.<sup>27</sup>

3  
4 iv. "Scratch"

5  
6 Bill Binnie. He sounds good on TV. But what do you find when you  
7 scratch the surface? Bill Binnie opposes the Arizona immigration law.  
8 Bill Binnie backs a value added tax—that's a national sales tax on  
9 everything you buy. And Bill Binnie got caught shipping jobs to Mexico,  
10 and then lied about it this summer. Call Bill Binnie. Tell him to stop  
11 supporting new taxes.<sup>28</sup>

12  
13 v. "Kentucky Values"

14  
15 [Announcer:] Kentucky values are being threatened. On economic issues like coal  
16 and agriculture, Rand Paul is opposed to helping farmers, and calls coal the least  
17 favorable form of energy. [Audio and footage of a "cuckoo" clock punctuate the  
18 sentence.] Kentucky's great military families would be surprised to know what Paul  
19 thinks of a nuclear Iran. [Audio of Rand Paul:] "Our national security is not  
20 threatened by Iran having one nuclear weapon." [Audio and footage of a "cuckoo"  
21 clock punctuate the sentence.] [Announcer:] And on creating Kentucky jobs, what  
22 does Rand Paul say? [Audio of crickets chirping.] Tell Rand Paul to stand up for real  
23 Kentucky values.<sup>29</sup>

24  
25 vi. "Issues"

26  
27 Issues comparison. Scott Brown supports an across-the-board tax cut.  
28 Martha Coakley says, quote, "We need to get taxes up." Brown has  
29 pledged not to raise taxes. Coakley says she will. Brown opposed the two  
30 trillion dollar Congressional spending spree that's putting us deeper in  
31 debt. Coakley supports massive new spending and the tax increases to pay  
32 for it. Call Martha Coakley and tell her we can't afford more taxes.<sup>30</sup>  
33

<sup>27</sup> The communication may be viewed at <http://youtu.be/FFuMSbIsVgQ>.

<sup>28</sup> The communication may be viewed at <http://www.youtube.com/watch?v=eksuYYFZzRo>. AFF reported spending a total of \$52,315 on this ad.

<sup>29</sup> The communication may be viewed at <http://www.youtube.com/watch?v=MePZmyK96tI>. AFF reported spending a total of \$39,802 on this ad.

<sup>30</sup> The communication may be viewed at <http://www.youtube.com/watch?v=See1nn8CNC0>. AFF reported spending a total of \$409,000 on this ad.

vii. "Up"

300,000 Massachusetts workers don't have jobs. But incredibly, Martha Coakley says, quote, "We need to get taxes up," end quote. Congress goes on a massive spending spree – trillions of your tax dollars that dig us deeper into debt. But Coakley supports the reckless spending by Washington politicians. And Coakley refuses to take a 'no new taxes' pledge. Call Martha Coakley and tell her we can't afford more taxes and wasteful spending.<sup>31</sup>

viii. "Enough"

Have you had enough? The U.S. unemployment rate is ten percent. 300,000 Massachusetts workers don't have jobs. And families are struggling. But Washington and Beacon Hill politicians just don't get it. And incredibly, Martha Coakley says, quote, 'We need to get taxes up,' end quote. Congress goes on a massive spending spree – trillions of your tax dollars that dig us deeper into debt. But Martha Coakley supports the reckless spending by Washington politicians and would spend even more. And Coakley supports hundreds of billions in new taxes that will hurt Massachusetts families and jobs. And she refuses to take a 'no new taxes' pledge. Call Martha Coakley at 617-727-2200. Tell her we can't afford more taxes and wasteful spending.<sup>32</sup>

ix. "Eggs"

Washington liberals are out of control. But Dan Burton's not afraid to crack some liberal eggs. Dan Burton said 'no' to the bank bailout because it didn't help Main Street. Burton rejected Obamacare and its job-killing tax hikes. And Burton is fighting Nancy Pelosi's runaway spending that's putting us deeper in debt. Dan Burton stands up for Indiana jobs and taxpayers. Call and tell Dan Burton to keep cracking those liberal eggs.<sup>33</sup>

x. "New York Jobs"

New York needs jobs. Michael Allegretti is a small business owner with a record of results. He's worked to create jobs throughout New York. Allegretti will oppose the wasteful spending in Washington. He'll support

<sup>31</sup> The communication may be viewed at <http://www.youtube.com/watch?v=xddm53deDdw>. AFF reported spending a total of \$191,000 on this ad.

<sup>32</sup> The communication may be viewed at [http://www.youtube.com/watch?v=-dX5436u\\_Oc](http://www.youtube.com/watch?v=-dX5436u_Oc). AFF reported spending a total of \$18,000 on this ad.

<sup>33</sup> The communication may be viewed at [http://www.youtube.com/watch?v=sGX\\_oVyZgC8](http://www.youtube.com/watch?v=sGX_oVyZgC8). AFF reported spending a total of \$171,500 on this ad.

1 lower taxes to help small businesses prosper. And he'll fight to expand  
2 opportunities for all New Yorkers. A fiscal conservative who will fight  
3 for New York jobs. Michael Allegritti. Call Allegritti and thank him for  
4 fighting for a stronger New York economy.<sup>34</sup>

5  
6 xi. "Certain"

7  
8 Not much in life is certain: death, taxes, and Bruce Braley voting to  
9 support Nancy Pelosi's liberal agenda. Braley may claim to be  
10 independent, but he supports Pelosi's agenda 98% of the time. 98 percent!  
11 Braley voted for the \$787 billion stimulus that wasted your tax dollars,  
12 and we still lost nearly three million jobs. He voted for Pelosi's trillion-  
13 dollar health care bill that cuts \$500 billion from Medicare, despite polls  
14 showing Americans didn't want it. Braley voted for job-killing energy  
15 taxes and for Pelosi's budgets that add trillions in debt. And Braley  
16 supports the biggest tax hike in history on Iowa's small businesses. Iowa  
17 needs jobs, not another vote for Nancy Pelosi. Call Braley. 563-323-  
18 5988. Tell him Iowa can't afford his taxes and spending.<sup>35</sup>

19  
20 xii. "Vote"

21 Iowa needs jobs, but Bruce Braley's another vote for Nancy Pelosi's job-  
22 killing agenda. Braley supports Pelosi's agenda 98% of the time. For the  
23 wasteful stimulus, and we still lost nearly three million jobs. For job-  
24 killing energy taxes. For a trillion dollar health care bill that slashes  
25 Medicare. Now Braley wants to spend billions more. Tell Braley we need  
26 jobs, not another vote for Pelosi's runaway spending.<sup>36</sup>

27  
28 xiii. "Adjourn"

29 Bruce Braley says he supports tax cuts for Iowa's families. But with the  
30 biggest tax hike in American history looming, Braley was the deciding  
31 vote to adjourn the House. Instead of fighting for lower taxes, Braley  
32 went home. Tax hikes will cost middle class Iowa families \$1600 each,

<sup>34</sup> The communication may be viewed at <http://www.youtube.com/watch?v=tj4UFLGduVs>. AFF reported spending a total of \$47,176 on this ad.

<sup>35</sup> The communication may be viewed at <http://www.youtube.com/watch?v=BEsAG6f4nZk>. AFF reported spending a total of \$39,594 on this ad.

<sup>36</sup> The communication may be viewed at <http://www.youtube.com/watch?v=tSnaQVCNyls>. AFF reported spending a total of \$215,556 on this ad.

1 and new taxes will cripple Iowa's small business. Tell Braley: "Don't  
2 vote to raise taxes on Iowa families."<sup>37</sup>

3  
4 xiv. "Louder"

5 Seen Bruce Braley's new TV commercials? Braley actually says that he  
6 supports tax cuts for Iowa working families. But Braley's actions in  
7 Washington speak louder than his TV ads in Iowa. With the biggest tax  
8 hike in American history looming, Braley was the deciding vote to adjourn  
9 the House. So instead of fighting for lower taxes, Braley went home. Tax  
10 hikes will cost middle-class Iowa families \$1600 each, and new taxes will  
11 cripple small businesses. But Braley went home. When he is in  
12 Washington, Braley votes to support Nancy Pelosi's agenda 98% of the  
13 time. Braley voted for the wasteful stimulus, and for Pelosi's trillion  
14 dollar health care bill that slashed five hundred billion from Medicare.  
15 Call Braley. 563-323-5988. Tell him to lead the fight against raising  
16 taxes instead of going home.<sup>38</sup>

17  
18 AFF argues in its response that none of the above communications can be classified as  
19 express advocacy under either 11 C.F.R. §§ 100.22(a) or 100.22(b), and that each of its  
20 electioneering communications qualifies as an "issue ad" under *Wisconsin Right to Life, Inc. v.*  
21 *FEC*, 551 U.S. 449 (2007) (distinguishing "issue ads" from those that are the "functional  
22 equivalent of express advocacy."). Resp. at 9. As discussed above, however, that argument fails  
23 to come to terms with the Commission's longstanding view — upheld by the courts — that the  
24 required major purpose test is not limited solely to express advocacy (or the functional  
25 equivalent of express advocacy). Each of the AFF ads features a clearly identified federal  
26 candidate, supports or opposes a candidate, and was run in the candidate's respective state  
27 shortly before a primary or election. The fact that the ads do not contain express advocacy, or

<sup>37</sup> The communication may be viewed at <http://www.youtube.com/watch?v=RLkc3pl-G8w>. AFF reported spending a total of \$146,516 on this ad.

<sup>38</sup> The communication may be viewed at <http://www.youtube.com/watch?v=--zykWJM18E>. AFF reported spending a total of \$19,272 on this ad.

1 the functional equivalent, does not shield such ads from consideration under the major purpose  
2 test.<sup>39</sup>

3 Nor does *Buckley* support an argument that determining an organization's major purpose  
4 is limited to consideration of its express advocacy. The Court first established the major purpose  
5 test in the context of its discussion of Section 434(e) — a provision that required the disclosure  
6 of expenditures by persons *other* than political committees. In order to cure vagueness concerns  
7 in that section, the Court construed "expenditure" to reach only express advocacy. *Id.* at 79-80.  
8 By contrast, limiting which expenditures *political committees* would have to disclose, the Court  
9 held that the term "political committee" — as defined in Section 431(d) — "need only  
10 encompass organizations that are under the control of a candidate or the major purpose of which  
11 is the nomination or election of a candidate." *Id.* at 79. Thus, the two limitations were imposed  
12 on two different terms in two different sections of the Act: (1) "express advocacy" as a  
13 limitation on "expenditures" made by persons other than political committees pursuant to Section  
14 434(e); and (2) "major purpose" as a limitation on the definition of "political committee"  
15 pursuant to Section 431(d). The opinion could have articulated a test that linked the limitations  
16 — requiring, for example, that to be considered a political committee an organization's "major  
17 purposed must be to *expressly advocate* the nomination or election of a candidate." But the  
18 Court did not take that tack. Indeed, the Court noted that even "*partisan committees*," which  
19 include "groups within the control of the candidate or *primarily organized for political*  
20 *activities*" would fall outside the definition of "political committee" *only* if they fail to meet the  
21 statutory spending threshold. *Id.* at 80 (emphasis added).

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<sup>39</sup> Similarly, the fact that some of the ads contain a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (*i.e.*, "Tell Braley: 'Don't vote to raise taxes on Iowa families'") does not immunize the communications from being considered federal campaign activity when determining major purpose.

1 Similarly, in *MCFL*, the Court's opinion nowhere suggests that express advocacy  
2 communications are the only kind of "campaign activity" that can satisfy the major purpose test.  
3 See *MCFL*, 479 U.S. at 252-53, 262 (political committee requirements inapplicable to  
4 "organizations whose major purpose is not *campaign advocacy*," but "political committee" does  
5 include organizations with a major purpose of "*campaign activity*") (emphasis added). And  
6 many lower federal courts have likewise decided that a determination of major purpose is not  
7 restricted to consideration of a group's express advocacy as compared to its other activities.<sup>40</sup>

8 AFF also argues in its response that "[w]hile the IRS and the FEC use different standards,  
9 it seems highly improbable that a Section 501(c)(4) organization that is in compliance with IRS  
10 standards could be found to satisfy the FEC's 'political committee' test." Resp. at 2. The  
11 Commission has determined previously, however, that "neither FECA, as amended, nor any  
12 judicial decision interpreting it, has substituted tax status for the conduct-based determination

<sup>40</sup> See *North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, "if the organization spends the majority of its money on *supporting or opposing* candidates") (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) ("an organization devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it") (emphasis added), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not . . . directly related to *promoting or defeating* a clearly identified 'candidate' for federal office") (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (Recognizing that "the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications" and "the FEC is entitled to consider the full range of an organization's activities in deciding whether it is a political committee"), *affirmed by* 681 F.3d 544 (4th Cir. June 12, 2012); Transcript of Oral Ruling, *Free Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012). But see *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*'s major purpose test as establishing that regulation as a political committee is only constitutionally permissible (1) when an organization's central purpose is "campaign or election related"; or (2) when a "preponderance of [the organization's] expenditures is for express advocacy or contributions to candidates."); Statement of Reasons, Comm'rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court's major purpose requirement to mean that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach . . . 'communications that expressly advocate the election or defeat of a clearly identified candidate'" (citing *Buckley*, 424 U.S. at 79-80); see also *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it "would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets").

1 required for political committee status.” Supplemental E&J at 5999. Rather, when interpreting  
2 and applying the Act, the Commission has concluded that “a detailed examination of each  
3 organization’s contributions, expenditures, and major purpose” is the proper approach, as  
4 described in detail above. *Id.*

5 AFF further argues that the FEC should apply the major purpose test to activity that  
6 occurred during the group’s fiscal tax year. Resp. at 2. A calendar year, however, not a self-  
7 selected fiscal year, provides the firmest statutory footing for the Commission’s major purpose  
8 determination — and is consistent with FECA’s plain language. The Act defines “political  
9 committee” in terms of expenditures made or contributions received “*during a calendar year.*” 2  
10 U.S.C. § 431(4) (emphasis added). A calendar year test is therefore consistent with the Act’s  
11 plain language.

12 Moreover, using a calendar year as the statutory basis for defining “political committee”  
13 as required by the Act but not as the basis for examining major purpose, as AFF suggests, could  
14 lead to absurd results. For example, two groups with identical spending patterns could be  
15 evaluated differently if one group ended its fiscal tax year on May 31 and the other’s fiscal tax  
16 year ended on December 31. The possibility of such an incongruous result is underscored by the  
17 ability of a nonprofit organization to change its tax filing period with the IRS.

18 Finally, examining a group’s spending with reference to a calendar year, rather than a  
19 fiscal year, is consistent with the Commission’s actions in the enforcement matters cited as  
20 guidance in the 2007 Supplemental E&J. In two matters cited by the 2007 Supplemental E&J —  
21 and in one concluded shortly thereafter — the Commission focused on the group’s activity  
22 during the 2004 calendar year for that election to determine major purpose, and only used the

1 groups' later activity to assess their ongoing reporting obligations as political committees.<sup>41</sup> The  
2 Commission, however, has not routinely examined a group's post-election activity unless such  
3 activity implicated its ongoing obligations under the Act.<sup>42</sup> Thus, whether AFF had the requisite  
4 major purpose should be determined by reference to its activities during the 2010 calendar year.

5 \* \* \* \*

6 In short, based on available information regarding AFF's spending in 2010, there is  
7 reason to believe that AFF's major purpose is federal campaign activity. AFF spent  
8 approximately \$7.36 million on express advocacy communications and approximately \$1.35  
9 million on non-express advocacy communications that support or oppose a clearly identified  
10 federal candidate. At a minimum, therefore, AFF spent approximately 41% of its 2010 budget  
11 on federal campaign activity (\$8.71 million out of \$21 million).

12 In addition, there are at least three other advertisements ("Mosque," "Positive Issues,"  
13 and "Out of Control") that support or oppose a candidate for which the total amounts spent are  
14 not available, and four electioneering communications<sup>43</sup> (totaling \$392,285) that are not readily  
15 available for viewing. Furthermore, AFF's calculation of its total spending in 2010  
16 (approximately \$21 million) appears to include several activities that in fact were paid for by  
17 AFF Political Action, thereby reducing the total spending attributable to AFF, and increasing the

<sup>41</sup> For example, in MUR 5487 (Progress for America Voter Fund), the Commission's major purpose analysis of the group's spending was based on the funds raised and spent "before the 2004 General Election." See Conciliation Agreement ¶¶ 33-36, MUR 5487 (Progress for America Voter Fund). The Commission limited its analysis to activity during 2004 even though Progress for America Voter Fund had raised approximately \$4.6 million and spent approximately \$11.2 million since the 2004 presidential election. See *id.* ¶ 18. The Commission has also noted when groups cease to function after an election cycle. See Conciliation Agreement ¶ 16, MUR 5754 (MoveOn.org Voter Fund); Conciliation Agreement ¶ 36, MURs 5511, 5525 (Swift Boat Veterans and POWs for Truth).

<sup>42</sup> Not surprisingly, many political committee enforcement matters involve groups that only spend funds during the calendar year of an election, and that spending thus necessarily forms the sole basis for major purpose analysis.

<sup>43</sup> "Not the Sopranos" (\$62,200); "Time" (\$203,000); "Teeth" (\$85,085); and "Indiana Jobs" (\$42,000).

1 percentage of AFF's spending that was devoted to the ads identified in this report. Taking this  
2 additional spending into account, the percentage of AFF's budget in 2010 that was spent on  
3 federal campaign activity is higher than 41%. Although it is unclear at this stage whether the  
4 amount AFF spent on federal campaign activity exceeds 50%, that is not dispositive. *See supra*  
5 at 8, 11 n.11; *see also Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009 (9th  
6 Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) ("Nothing in *Buckley* suggests . . . that disclosure  
7 requirements are constitutional only when applied" to "organizations whose *single* major  
8 purpose was political advocacy") (emphasis added). Accordingly, there is reason to believe that  
9 AFF's major purpose in 2010 was federal campaign activity (i.e., the nomination or election of a  
10 federal candidate). *See* Statement of Policy Regarding Commission Action in Matters at the  
11 Initial Stage of the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("[R]eason to  
12 believe findings indicate only that the Commission has found sufficient legal justification to  
13 open an investigation to determine whether a violation of the Act has occurred.").

14 **C. Conclusion**

15  
16 AFF made over \$1,000 in expenditures during 2010, and its spending during that  
17 calendar year indicates that it had as its major purpose federal campaign activity (i.e., the  
18 nomination or election of federal candidates). Accordingly, we recommend that the Commission  
19 find reason to believe that American Future Fund violated 2 U.S.C. §§ 432, 433, and 434, by  
20 failing to organize, register, and report as a political committee, and that the Commission  
21 authorize an investigation.

22 **III. PROPOSED DISCOVERY**

23 We plan to seek information (1) to establish the extent, nature, and cost of AFF's federal  
24 campaign activity and (2) to identify potential witnesses who may have relevant knowledge of

1 these facts. We also request that the Commission authorize the use of compulsory process,  
2 including the issuance of appropriate interrogatories, document subpoenas, and deposition  
3 subpoenas, as necessary. The information sought through any discovery would be focused on  
4 ascertaining the scope of AFF's reporting obligations, and would be consistent with the type of  
5 information that the Commission seeks in its analysis of a group's requirements as a political  
6 committee.

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IV. RECOMMENDATIONS

1. Find reason to believe that American Future Fund violated 2 U.S.C. §§ 432, 433, and 434.
2. Approve the attached Factual and Legal Analysis.
3. Authorize the use of compulsory process in this matter.
4. Approve the appropriate letters.

Date

01/17/13

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